ARKANSAS COURT OF APPEALS

DIVISION III
No. CA 08-517

	Opinion Delivered FEBRUARY 25, 2009
TAYLOR CHANEY APPELLANT	APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT, [NO. CV2006-916-5]
V.	HONORABLE GARY L. CARSON, JUDGE
GINA KERN APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Taylor Chaney sued appellee Gina Kern for negligence in connection with an automobile accident that occurred on May 3, 2003. Mr. Chaney alleged that he was injured in the accident, and prayed for damages resulting from his injuries. After a jury trial, a verdict was entered in favor of Ms. Kern. Mr. Taylor now appeals, arguing that the trial court erred in refusing to give his proffered jury instruction based on AMI Civil 903, and Ark. Code Ann. § 27-51-305(a) (Supp. 2007). The proffered instruction reads:

> There was in force in the State of Arkansas at the time of the occurrence a statute, Ark. Code Ann. § 27-51-305, Following Too Closely, which provided as follows:
>
> (a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of vehicles and the traffic upon and the condition of the highway.

> A violation of this statute, although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in the case.

We affirm.

Ms. Kern testified that she was driving her car in Fayetteville on May 3, 2003, and approached the intersection of Sixth Street and Razorback Road. Mr. Chaney was stopped at the red light, preparing to turn right. Ms. Kern pulled up behind him and stopped far enough away to where she could see his tires touching the road. According to Ms. Kern, there were no cars coming and Mr. Chaney proceeded to make his right turn. Ms. Kern took her foot off the brake and her car moved forward under its own power. Ms. Kern testified that Mr. Chaney stopped again but that she did not realize it until she ran into him. She stated that the right side of the rear bumper of appellant's car was partially knocked off and hanging down after she struck him. Ms. Kern testified that after she bumped him, Mr. Chaney continued to make his right turn and pulled into a carwash where they discussed the accident. Ms. Kern stated, "I didn't even feel a jerk forward when I bumped him," and indicated that Mr. Chaney did not seem hurt at all.

Mr. Chaney testified that it felt like Ms. Kern's car was going at least fifteen miles per hour, and that it was "a very hard impact" that jolted him. He subsequently sought medical treatment for back and neck pain nine days later, and was released from care by his chiropractor, Dr. Steven Whitelaw, on September 26, 2003. Dr. Whitelaw testified that he treated Mr. Chaney for a chronic spine condition that he had suffered for many years, but

also reported that Mr. Chaney's cervical spine pain was secondary to the motor vehicle collision.

Mr. Chaney argues on appeal that the trial court erred in refusing to instruct the jury that a violation of our "following too closely" statute is evidence of negligence. A party is entitled to a jury instruction when it is a correct statement of the law and there is some basis in the evidence to support the giving of the instruction. *Vann v. Cook*, 70 Ark. App. 299, 17 S.W.3d 103 (2000). Mr. Chaney asserts that the requested instruction was a correct statement of the law given that it accurately tracked AMI Civil 903 and quoted verbatim from Ark. Code Ann. § 27-51-305(a) (Supp. 2007). Moreover, Mr. Chaney contends that there was some basis in the evidence for giving the instruction at trial. It is undisputed that Ms. Kern's car rear-ended Mr. Chaney's car, and Ms. Kern testified that she took her foot off the brake and allowed her car to move forward until the collision occurred. Mr. Chaney complains that the trial court stated no basis for denying the instruction, and maintains that the refusal to give the instruction resulted in prejudice because he was not allowed to present his theory of liability to the jury that the collision occurred because Ms. Kern followed too closely in violation of her statutory duty. As a result of the asserted error, Mr. Chaney requests that this case be reversed and remanded for a new trial.

We hold that Mr. Chaney's argument is not preserved for review because his proffer of the proposed jury instruction was not timely. At the close of the evidence, the trial court and both parties' attorneys proceeded into chambers to discuss jury instructions. Upon returning to open court outside the presence of the jury, the trial court asked appellant's

counsel, "Do you want to make your record on the jury instructions?" Mr. Chaney declined to make any objections or proffers at that time, indicating that he would wait until after the jury retires. The trial court then gave the jury instructions, and after the jury retired to deliberate appellant's counsel made his proffer. This was too late.

Rule 51 of the Arkansas Rules of Civil Procedure provides, in relevant part:

> At the close of the evidence or at such earlier time as the court may reasonably direct, any party may submit requested jury instructions to the court. The court shall inform counsel of its proposed action upon the requested instructions and also inform counsel of all other instructions it proposes to submit to the jury. The court shall instruct the jury prior to the arguments of counsel. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of his objection, and no party may assign as error the failure to instruct on any issue unless such party has submitted a proposed instruction on that issue. Opportunity shall be given to make objections to instructions out of the hearing of the jury.

For a party to preserve for appeal any objection to the trial court's failure to give an instruction, that party must make a proffer of the instruction to the trial judge and make his objections. *Precision Steel Warehouse, Inc. v. Anderson-Martin Mach. Co.*, 313 Ark. 258, 854 S.W.2d 321 (1993). In order to be timely, objections to instructions must be made either before or at the time the jury instructions are given. *Young v. Johnson*, 311 Ark. 551, 845 S.W.2d 510 (1993). Waiting to object until after the jury has been instructed on the law and has retired is untimely, for it gives the trial court no opportunity to react to the instructions at issue or to amend them. *MIC v. Barrett*, 313 Ark. 527, 885 S.W.2d 326 (1993). We will not consider objections that are not timely made. *Id.*

Appellant's proffer appears in the record to have been made for the first time after the jury was charged and retired to consider its verdict. While appellant asserts that his proffer

and objections were originally made at the in-chambers hearing before the jury was charged, there is no record of this hearing. Despite the trial court's invitation to make a timely proffer on the record, appellant's counsel declined. Since we are not able to ascertain from the record or abstract any proffer made prior to the jury returning to consider its verdict, the trial court's failure to give the desired instruction need not be addressed on appeal. It is appellant's duty to demonstrate error below and to bring up a record sufficient to demonstrate error. *MIC v. Barrett*, *supra.*

We acknowledge that in Mr. Chaney's reply brief he argues that because Ms. Kern made no objection to his waiting until after the jury retired to make his proffer, this indicated that a proper objection and tender of the instruction was made during the in-chambers conference. We do not agree. Ms. Kern's counsel made no suggestion of any specific objections or proffers, and her counsel's acquiescence to the procedures did not obviate Mr. Chaney's duty to make a timely proffer and objection.

Affirmed.

BROWN, J., agrees.

MARSHALL, J., concurs.